

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

DARRYL LLOYD WHITE,

Plaintiff,

vs.

JIM GIBBONS, *et al.*,

Defendants.

2:08-cv-0388-RLH-LRL

**ORDER**

Before the Court are defendants' petition of removal (docket #1), plaintiff's pro se civil rights complaint (docket #1, Exhibit A), defendants' statement of removal (docket #3), defendants' removal status report (docket #7), and defendants' motion for clarification (docket #9).

**I. Removal of this Action was Proper**

Plaintiff, an inmate at High Desert State Prison, filed a pro se civil rights complaint on February 5, 2008, in the District Court for Clark County. Defendants Skolnik, Cox, McDaniel, Neven, and Baca received a copy of the complaint and summons on February 26, 2008. Defendants Gibbons, Cortez Masto and Miller have not been served. Defendants filed a petition for removal in this Court on March 26, 2008 (docket #1). "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Plaintiff has alleged a violation of his rights under the U.S. Constitution. Defendants appropriately

1 removed the action to this Court pursuant to 28 U.S.C. § 1441, as this Court has original jurisdiction  
2 over the claims raised in the complaint.

## 3 **II. Screening of the Complaint**

4           The complaint must be screened pursuant to 28 U.S.C. §1915A. Federal courts must  
5 conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental  
6 entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the  
7 court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to  
8 state a claim upon which relief may be granted or seek monetary relief from a defendant who is  
9 immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). Pro se pleadings, however, must be liberally  
10 construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9<sup>th</sup> Cir.1988). To state a claim  
11 under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the  
12 Constitution or laws of the United States was violated, and (2) that the alleged violation was  
13 committed by a person acting under the color of state law. See *West v. Atkins*, 487 U.S. 42, 48  
14 (1988).

15           In addition to the screening requirements under § 1915A, a federal court must dismiss  
16 a prisoner's claims, "if the allegation of poverty is untrue," or if the action "is frivolous or  
17 malicious," "fails to state a claim on which relief may be granted," or "seeks monetary relief against  
18 a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2); 42 U.S.C. § 1997e(c)(1), (2).  
19 Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided for  
20 in Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard when reviewing  
21 the adequacy of a complaint or amended complaint.

22           Review under Rule 12(b)(6) is essentially a ruling on a question of law. See *Chappel*  
23 *v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a  
24 claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim  
25 that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In  
26 making this determination, the Court takes as true all allegations of material fact stated in the

1 complaint, and the Court construes them in the light most favorable to the plaintiff. *See Warshaw v.*  
 2 *Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations in a *pro se* complaint are held to less  
 3 stringent standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9  
 4 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*per curiam*).

#### 5 **A. Plaintiff's Allegations**

6 Plaintiff names the following individuals as defendants to this action: Jim Gibbons,  
 7 Governor of the State of Nevada; Catherine Cortez Masto, Nevada Attorney General; Ross Miller,  
 8 Nevada Secretary of State; Howard Skolnik, Director of the Nevada Department of Corrections;  
 9 James Cox, Assistant Direct of Operations of NDOC; E.K. McDaniel, Warden of Ely State Prison;  
 10 Dwight Neven, Warden of HDSP; and Isidro Baca, Associate Warden for Operations as HDSP.

11 Plaintiff alleges that defendant Baca issued a memorandum instituting a ban of  
 12 typewriters as HDSP after defendant Cox determined that all prisons should ban inmate typewriters.  
 13 Plaintiff contends that the sole purpose of banning inmate typewriters is to retaliate against him for  
 14 filing law suits challenging deprivations of his constitutional rights. Plaintiff states that the  
 15 defendants are acting wantonly, as there are more reasonable and viable alternatives to the typewriter  
 16 ban, such as having correctional officers at HDSP perform their daily cell inspections and appliance  
 17 checks are they are required. Plaintiff also states that there have only been incidents at ESP, which is  
 18 a maximum security prison, and there have been no similar incidents at a medium or minimum  
 19 security prison. Plaintiff alleges that he has suffered unjustifiable physical, psychological, and  
 20 emotional duress due to the typewriter ban.

#### 21 **B. Failure to Link Named Defendants to Constitutional Violation**

22 Section 1983 requires there to be an actual connection or link between the actions of  
 23 the defendants and the deprivation alleged to have been suffered by plaintiff. *See Monell v.*  
 24 *Department of Social Services*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976). The  
 25 Ninth Circuit has held that "[a] person 'subjects' another to the deprivation of a constitutional right,  
 26 within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative

1 acts or omits to perform an act which he is legally required to do that causes the deprivation of which  
2 complaint is made." *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). Plaintiff has failed to link  
3 defendants Gibbons, Cortez Masto, and Miller with some affirmative act or omission violative of his  
4 constitutional rights. Plaintiff's complaint contains no mention or discussion of these defendants.  
5 This is insufficient to state a claim, because plaintiff has not linked these individual defendants with  
6 acts of conspiracy, retaliation or deprivation of property.

7 Furthermore, plaintiff also has failed to link defendant E.K. McDaniel to any act or  
8 omission that has violated his constitutional rights. E.K. McDaniel is the Warden of ESP. Plaintiff  
9 is not an inmate at ESP, and defendant McDaniel has not acted in any way to affect plaintiff's rights  
10 as HDSP.

### 11 **C. Conspiracy**

12 To prove conspiracy between the named prison officials under § 1983, an agreement  
13 or meeting of minds to violate the plaintiff's constitutional rights must be shown. *Woodrum v.*  
14 *Woodward County, Okl.*, 866 F.2d 1121, 1126 (9th Cir.1989) (citing *Fonda v. Gray*, 707 F.2d 435  
15 (9th Cir.1983)). "To state a claim for conspiracy to violate one's constitutional rights under section  
16 1983, the plaintiff must state specific facts to support the existence of the claimed conspiracy."  
17 *Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989) (citations omitted). Plaintiff makes only  
18 bald allegations of conspiracy without providing any facts to show how the named defendants came  
19 to agree to institute a policy to deprive him of his typewriter. Plaintiff provides no statements  
20 alleged to have occurred among the defendants or any other circumstances from which he might  
21 have derived his theory. In fact, in contradiction of the allegations of conspiracy, plaintiff states that  
22 the policy of banning inmate typewriters was put in place after an incident that occurred at ESP, and  
23 the officials stated that it is for safety and security concerns. Plaintiff cannot allege facts to support  
24 his conspiracy claim, therefore this claim will be dismissed.

25 ////

26 ////

1           **D. Retaliation**

2           Plaintiff alleges that the defendants have banned inmate typewrites as retaliation for  
3 his filing of lawsuits against the defendants for depriving him of his constitutional rights.  
4 Allegations of retaliation against a prisoner's First Amendment rights to speech or to petition the  
5 government may support a section 1983 claim. *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985);  
6 *see also Valandingham v. Bojorquez*, 866 F.2d 1135 (9th Cir. 1989). Plaintiff must allege that  
7 defendants acted to retaliate for his exercise of a protected activity, and defendants' actions did not  
8 serve a legitimate penological purpose. *See Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994);  
9 *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995). Plaintiff has stated sufficient facts to allow this  
10 claim to proceed, as he has alleged that the ban of typewriters is in retaliation against his right to  
11 petition the government, and that the inmate typewriter ban does not serve a legitimate penological  
12 interest, in that there are more reasonable and viable alternatives that would impose a de minimis  
13 burden.

14           **E. Deprivation of Property**

15           Petitioner asserts that the defendants are knowingly, willfully, and intentionally  
16 depriving him of his right to personal property (his typewriter) under the false pretenses of security,  
17 when no legitimate penological purpose exists. An authorized, intentional deprivation of property is  
18 actionable under the Due Process Clause. *See Hudson v. Palmer*, 468 U.S. 517, 532, n.13 (1984)  
19 (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982)); *Quick v. Jones*, 754 F.2d 1521, 1524  
20 (9th Cir. 1985). An authorized deprivation is one carried out pursuant to established state  
21 procedures, regulations, or statutes. *Logan v. Zimmerman Brush Co.*, 455 U.S. at 436; *Piatt v.*  
22 *McDougall*, 773 F.2d 1032, 1036 (9th Cir. 1985); *see also Knudson v. City of Ellensburg*, 832 F.2d  
23 1142, 1149 (9th Cir. 1987). Authorized deprivations of property are permissible if carried out  
24 pursuant to a regulation that is reasonably related to a legitimate penological interest. *Turner v.*  
25 *Safley*, 482 U.S. 78, 89 (1987). Plaintiff has alleged sufficient facts to allow his property deprivation  
26 claim to proceed.

1           **F. Negligence and Misconduct Claims**

2           To the extent that petitioner has alleged that defendants have committed misconduct,  
3 misfeasance, malfeasance and negligence in their banning of inmate typewriters, petitioner has not  
4 stated a viable claim. “Mere negligence or lack of due care by state officials in the conduct of their  
5 duties does not trigger the substantive due process protections of the Fourteenth Amendment and  
6 therefore does not state a claim under section 1983.” *Woodrum v. Woodward County, Okl.*, 866 F.2d  
7 1121, 1126 (9th Cir.1989) (citing *Daniels v. Williams*, 474 U.S. 327, 330-32 (1986)). However, the  
8 Supreme Court has not yet determined whether “something less than intentional conduct, such as  
9 recklessness or ‘gross negligence,’ is enough to trigger the protections of the Due Process Clause.”  
10 *Daniels*, 474 U.S. at 334 n. 3. Plaintiff’s claim that defendants wantonly or recklessly disregarded  
11 his property rights with full consciousness of their actions is sufficient to state a claim.

12           **III. Conclusion**

13                       **IT IS THEREFORE ORDERED** that defendant’s Motion for Screening (Docket  
14 #4) is **GRANTED**.

15                       **IT IS FURTHER ORDERED** that plaintiff’s allegations, with respect to defendants  
16 Gibbons, Cortez Mastro, Miller, and McDaniel are **DISMISSED** for failure to state a viable claim.

17                       **IT IS FURTHER ORDERED** that plaintiff’s allegations of retaliation, deprivation  
18 of property, and wanton negligence state viable claims against defendants Skolnik, Cox, Neven, and  
19 Baca.

20                       **IT IS FURTHER ORDERED** that plaintiff’s claims of civil conspiracy, misconduct,  
21 misfeasance, malfeasance, and negligence are **DISMISSED** for failure to state a viable claim.


22                       **IT IS FURTHER ORDERED** that the Clerk shall **FILE** the complaint (attached at  
23 docket #1).

24                       **IT IS FURTHER ORDERED** that this action may proceed on the remaining claims  
25 contained in the complaint.

26       ////

1                   **IT IS FURTHER ORDERED** that defendants' motion for clarification (docket #9)  
2 is **GRANTED**. Defendants shall file and serve an answer or other response to the complaint within  
3 **thirty (30) days** of the date of entry of this order.

4  
5                   DATED this 23<sup>rd</sup> day of September, 2008.

6  
7                     
8                   CHIEF UNITED STATES DISTRICT JUDGE  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26